Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-726

J. P. STEVENS & CO., INC., and JUNIOR ANDERSON, MASON LEE, TOMMY GARDNER, JAMES ALSTON, LARRY BURROUGHS, HAROLD GUERRY, WILLIAM HINTON, RAY MABRY, CHESTER MARTIN, ED MITCHUM, ERNEST MEADOWS, DAVE MOODY, VERNON PAYNE, TROY QUICK, JIMMY MARTIN, ROBERT RAWLINGS, MACK RENEGAR, MAX SHAVER, HOWARD SELLERS, ALLEN SHEW, EUGENE TAYLOR, JOHN THOMAS, RAYMOND THOMPSON,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF

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INDEX

PETITIONERS' REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES:

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) 3

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). 1

NLRB v. *Johnson Manufacturing Co.*, 511 F.2d 153 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975) 3

NLRB v. *Lynair*, 380 F.2d 286 (6th Cir. 1967) 5

NLRB v. *Schill Steel Products, Inc.*, 480 F.2d 586 (5th Cir. 1973) 3

Union Tool Co. v. *Wilson*, 259 U.S. 107 (1922) 3

United States v. *Greyhound Corp.*, 370 F.Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974) ... 6

CONSTITUTIONAL PROVISIONS:

Amendment V to the United States Constitution .. 2, 4, 10

STATUTES:

All Writs Act, 28 U.S.C. § 1651(a) 3

National Labor Relations Act 2, 3, 4, 5, 6, 10

Section 7 4

Section 8(b)(1)(A) 4

Rule 65(d), Federal Rules of Civil Procedure 2, 4, 10

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PETITIONERS' REPLY BRIEF

The Brief in Opposition filed by Respondent does not dispute Petitioners' contention that this case poses novel and important questions regarding the extent to which a court's contempt power may be used to infringe upon an employer's fundamental right to control the use of his property. Indeed, the Brief in Opposition illustrates the extent to which Respondent will continue to advocate the imposition in contempt proceedings of orders granting nonemployee union representatives access to an employer's plants and facilities despite this Court's holding in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Furthermore, Respondent does not establish that the order of

the Court of Appeals comports with Rule 65(d) of the Federal Rules of Civil Procedure and the due process clause of the Constitution. Accordingly, Supreme Court guidance is required to define the limitations on a court's power in civil contempt proceedings arising from violations of a court's order enforcing the National Labor Relations Act.

Furthermore Respondent's Brief presents this case as if it were run-of-the-mill labor litigation in which unexceptional directives have been imposed on J. P. Stevens & Co., Inc. ("Stevens" or "the Company") to remedy clearly established offenses. This case is, on the contrary, quite the opposite in both of these fundamental respects. Its directives are of extraordinary severity and, in important part, unprecedented. And the offenses which purportedly justify such directives cannot in any respect fulfill the clear and convincing standard essential to support a contempt determination.

Respondent alleges that Petitioners are "foreclosed" from challenging the power of the Court of Appeals to issue an access order that infringes on an employer's right to control the use of his property because such an argument was not made in the Court of Appeals. Respondent, however, has overlooked that portion of the "Counter-Statement Regarding Terms of Court Order," submitted by Petitioners in the Court of Appeals, in which Petitioners specifically objected to the imposition of the access provisions:

> The simple and realistic fact is that under the Board's provisions for the "non-work areas" of these plants, the Company would have lost the ability to manage the operations of its plants as truly as if the plants had been taken away from the Company by court order.

Moreover, Respondent claims that because the order of the Court of Appeals is based upon the civil contempt power, the Court of Appeals properly ignored the constraints imposed by the National Labor Relations Act. Indeed, Respondent argues that a court, in seeking to enforce compliance with the National Labor Relations Act by its contempt power, may properly infringe on an employer's right to control the use of his property even though this right is protected under the National Labor Relations Act.* Given the importance of this issue to labor-management relations, it is essential that this Court delineate the restraints on a court's civil contempt power in cases arising under the National Labor Relations Act.

Respondent's reliance on two cases from the Fifth Circuit to support the propriety of the Court of Appeals' access edict does not generate support for Respondent's position in this Court. In neither *NLRB* v. *Johnson Manufacturing Co.*, 511 F.2d 153 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975), nor in *NLRB* v. *Schill Steel Products, Inc.*, 480 F.2d 586 (5th Cir. 1973), was this Court asked to review those portions of the orders that granted nonemployee union representatives access to the employers' plants and facilities. These cases can hardly be relied on to justify the vast

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* Respondent has ignored the legal doctrine stated in the Petition that while "[t]he measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief," *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949), the terms of such relief must protect public and private rights and abide by "well-settled principles of law." *McComb, supra*, at 191; *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112 (1922). Indeed, the All Writs Act, 28 U.S.C. § 1651(a), cited by Respondent to support its position, requires that all writs issued by a court be "agreeable to the usages and principles of law."

incursion on an employer's right to control the use of his property which Respondent is seeking here.

Further, there is no basis for Respondent to describe as "speculative fear" Petitioners' concern that the access order will deprive an employer of the right to manage his operations in an efficient and peaceful manner. (Brief in Opp., note 9 at 11) Implementation of the order will permit professional union organizers to solicit continually employees in the "non-work" areas of the plant. Moreover, because Paragraph 14 of the order requires the Company to provide union organizers with the names and addresses of all its employees in North and South Carolina, implementation of the access order will insure that every employee of the Company will be constantly approached by professional union organizers during the employee's working hours, during the employee's breaks, and during the employee's non-working time spent at home. Indeed, implementation of the order could infringe on an employee's right to refrain from organizational activities as guaranteed by Sections 7 and 8(b)(1)(A) of the National Labor Relations Act.

Petitioners also take issue with Respondent's contention that there is no basis for finding the order of the Court of Appeals to be so vague as to be violative of Rule 65(d) of the Federal Rules of Civil Procedure and the due process clause of the Constitution. It is interesting to note that Respondent does not attempt to define the meaning of the term "reasonable" as used throughout the Court's order. Having proposed this order, Respondent should be able to indicate with specificity the meaning of a mandate permitting a "reasonable" number of union representatives access for "reasonable" periods of time to the non-work areas in the Company's plants. Instead, Respondent

argues that the term "reasonable" is found in numerous court orders under the National Labor Relations Act. Analysis of the cited cases reveals that many of the court orders do not even use the term "reasonable." Moreover, in one instance where the term "reasonable" was used in a court's order, the court was able to refer to prior cases that specifically interpreted the meaning of the word "reasonable" as used in the order. *NLRB* v. *Lynair,* 380 F.2d 286 (6th Cir. 1967). Finally, none of the cases cited by Respondent can be compared with the instant case where the Company is threatened with massive fines and the issuance of writs of body attachment against its officers and agents for noncompliance with an order that defies specific interpretation.

Respondent further argues that the "use of the qualifying term 'reasonable,' if anything, should afford the Company greater latitude in the good faith management of its affairs." (Brief in Opp. at 12) Indeed, it is this very "latitude" that will serve as an invitation to the union to challenge on every occasion the conduct of the Company, which could result in a finding that good faith action on the part of the Company was not "reasonable" and constituted a "continuing violation" of the Court's order.

The vagueness of the Court's order is further compounded in that the Court of Appeals has imposed excessive "compliance fines" upon the Company in the amount of $100,000 for each violation and $5,000 per day for each day the violation continues. Respondent contends that these compliance fines are not excessive and are in fact comparable with compliance fines imposed in other civil contempt cases. (Brief in Opp., note 14 at 15) Yet of the cases cited by Re-

spondent in support of this argument, one case involved a criminal contempt fine and is therefore supportive of Petitioners' position that the compliance fine is punitive. *United States* v. *Greyhound Corp.*, 370 F.Supp. 881 (N.D.Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974). However, of more importance, the civil contempt cases cited by Respondent threatened imposition of compliance fines for noncompliance with precise directives from the courts. None of the cases required the contemnors to conduct certain activities in an undefined "reasonable" manner, as required by the order of the Court of Appeals.

Finally, Respondent's Brief summarizes the various incidents which led to the findings against the Company as though such incidents were indisputable violations of the National Labor Relations Act constituting "clear and convincing" evidence of contempt and deserving of the drastic sanctions imposed by the Court of Appeals. The Petitioners are well aware that this Court cannot analyze and weigh evidence in order to determine what is the correct version of a factual controversy. However, Respondent's treatment of the facts underlying the decision of the Court of Appeals cannot be left unchallenged.

Respondent refers to three incidents that occurred at the Company's plant in Turnersburg, North Carolina, as a "campaign of interference with the statutorily-protected solicitation and distribution activities of seven employees on the eve and day of a Board election at the plant." (Brief in Opp. at 6) In all three incidents, employees who were distributing leaflets on the Company's property were asked to distribute the leaflets off the premises. The employees involved in these incidents were neither reprimanded, discharged

nor "written up" for these activities. (Pet. App. at 50a) The Special Master found this conduct contemptuous because the Company had no specific rules prohibiting these activities and the Company on earlier occasions had condoned the sale of merchandise in the plant and also had permitted solicitation on the premises for sick employees and families of deceased employees. (Pet. App. at 47a) In fact, in one of the three incidents the Company was held in contempt for requesting that leafletting in the plant on the day of the election be ceased even though an agent of the National Labor Relations Board who was observing the election subsequently required that the distributors of the literature be asked to leave the premises because leafletting was not permitted on the day of the election. (Pet. App. at 46a)

Respondent also states that the Company placed an electronic eavesdropping device in the motel room of a union organizer and monitored the meetings between the union organizer and Company employees. (Brief in Opp. at 6) Two employees were indicted for this incident, but after trial the United States District Court directed an acquittal. A third employee was found by the Special Master not to have been involved. No other person in the Company's management was charged by any law enforcement official or by the Respondent as having had any involvement in the matter. The Court of Appeals found that the Company repudiated such conduct in a timely and unequivocal manner but that its repudiation was deficient because it failed to indicate that the Company would make no use of any information it might have obtained from the eavesdropping—a conclusion which could properly be considered to be inherent in an unequivocal repudiation. The Court of Appeals concedes that "the

facts are close," but that the Company's "anti-union background" was a factor in tipping the balance. (Pet. App. at 15a)

With regard to the incident involving employee Jimmy Grooms, which Respondent characterizes as a discriminatory reprimand (Brief in Opp. at 6), Respondent ignores the fact that Grooms was ordered to stay especially close to his machine to prevent the production of inferior cloth. (Pet. App. at 51a) Grooms was later found to be wandering away from his machine, and was reprimanded. Yet because of Grooms' past union activities, the Special Master held that this reprimand was in contempt of the Court's prior decree. (Pet. App. at 52a)

Respondent has also misrepresented the incidents at the Roanoke Rapids, North Carolina plants of Stevens. Respondent claims that the Company "coercively polled" all of its employees at these plants to determine if they thought a union would "help" or "hurt" them. (Brief in Opp. at 6) The polling, conducted by means of an employee opinion survey, is misinterpreted by Respondent as a surveillance of the employees' union activities. Respondent further accuses the Company of misrepresenting the result in a posted notice. The survey, conducted by an outside professional group hired by the Company, contained 48 questions, of which only one dealt with employees' attitudes toward the union. The answers by any given employee were not identifiable by the Company and the employees were not required to participate in the survey. The notice, which dealt only with the one question concerning the union, was posted at the insistence of Respondent. With regard to the claimed misrepresentation, the Special Master stated that the Company's version of the result was "reasonably accurate if supervisory personnel are added." (Pet. App at 83a) Although these supervisory individuals were at all times included in the survey, the Special Master found that because there appeared to be a misrepresentation "in the eyes of the average non-supervisory employee," Stevens had interfered with the employees' right to self-organization as required in a prior decree. (Pet. App. at 83a)

Respondent's assertion that the Company discharged employee Crystal Lee Jordon because of her union activities (Brief in Opp. at 7) ignores the Special Master's statement that it was likely this employee may have been fired because of her "shrill conduct." (Pet. App. at 74a) Nevertheless, the Special Master still found "clear and convincing" evidence that she was fired because of her union activities. With regard to Respondent's statement that supervisor Vernon Payne coercively interrogated employee Linda Williams (Brief in Opp. at 7), the Special Master found that the supervisor involved spoke to this employee regarding complaints made by other employees about Williams' "bothering" and "harassing" them. (Pet. App. at 76a) Again, because the employee involved was a union supporter, the Special Master found "clear and convincing" evidence of interference with an employee in the exercise of her right to organize or to assist the union. The Special Master made no finding of a coercive interrogation with regard to this incident, as Respondent claims.

These examples are representative of the incidents which the Respondent and the Court of Appeals consider as constituting "clear and convincing" evidence of contemptuous conduct, and which have led to the

imposition by the Court of Appeals of remedies of the enormous severity delineated by the Company in its Petition.

CONCLUSION

This brief analysis of the procedures used to justify a finding of contempt illustrates the need for Supreme Court guidance on the proper interpretation and application of the clear and convincing standard in civil contempt proceedings. This guidance is especially necessary here where a court has imposed penalties and sanctions which are disproportionate in both magnitude and severity. Finally, this Court should consider whether a court may infringe on an employer's right to control the use of his property in a civil contempt proceeding arising under the National Labor Relations Act and whether an order so dependent upon the frequent application of a "reasonable" standard and which threatens massive compliance fines and writs of body attachment is violative of Rule 65(d) of the Federal Rules of Civil Procedure and the due process clause of the Constitution.

Respectfully submitted,

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